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No. 93-412

In the Supreme Court of the United States

OCTOBER TERM, 1993

DAVID M. DALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the search warrant in this case satisfied the particularity requirement of the Fourth Amendment.

2. Whether petitioner made a "substantial preliminary showing" under *Franks* v. *Delaware*, 438 U.S. 154 (1978), that material false statements were intentionally or recklessly included in a search warrant affidavit.

3. Whether the district court abused its discretion by admitting tape recordings without making an express finding that the tapes were trustworthy.

4. Whether a course of conduct that includes violations of the criminal provisions of the Internal Revenue Code can properly support convictions for conspiracy to defraud the United States in violation of 18 U.S.C. 371 and wire fraud in violation of 18 U.S.C. 1343.

5. Whether the district court erroneously defined the term "reasonable doubt" in its instructions to the jury.

6. Whether petitioner's sentence was inconsistent with the Sentencing Guidelines.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. a1-a70) is reported at 991 F.2d 819. The order of the court of appeals remanding the case for clarification (Pet. App. a71-a73) is unreported, as is the district court's memorandum order (Pet. App. a74-a75) transmitting two memorandum decisions (Pet. App. a76-a81, a82-a102) to the court of appeals. The district court's decision on petitioner's motion to dismiss (Pet. App. a103-a125) is reported at 782 F. Supp. 615.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1993. A petition for rehearing was denied on June 16, 1993. Pet. App. a161. The petition for a writ of

certiorari was filed on September 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on one count of conspiracy to defraud the United States and to commit various offenses, in violation of 18 U.S.C. 371; one count of subscribing to a false corporate tax return, in violation of 26 U.S.C. 7206(1); one count of attempting to evade income taxes, in violation of 26 U.S.C. 7201; one count of wire fraud, in violation of 18 U.S.C. 1343; two counts of concealing material facts from the Department of Defense by trick, scheme, or artifice, in violation of 18 U.S.C. 1001; and one count of making false statements to the Department of Defense, in violation of 18 U.S.C. 1001. Pet. App. a14-a15. He was sentenced to 41 months' imprisonment, a $675,000 fine, and a two-year term of supervised release. *Id.* at a15-a16. The court of appeals affirmed the convictions, but remanded for resentencing on grounds not relevant to the questions presented by the petition. *Id.* at a70.

1. The evidence at trial showed that petitioner and Michelle Ashton were Executive Vice-President and President, respectively, of Automated Data Management, Inc. (ADM), a Washington, D.C., firm. Ashton owned 82% of ADM's stock and petitioner owned the remaining 18%. In early 1985, ADM secured a contract to sell computers to the United States Army. Later that year, ADM opened offices in Germany and Korea. Terence Sweeney was hired as Vice-President in charge of ADM's European operations and David Bowers was hired as his counterpart in charge of Asian operations. Martin

Segal subsequently became Chief Financial Officer of ADM. Pet. App. a4.[1]

In the summer of 1986, Bowers arranged for Nancy Edwards, a legal adviser to ADM's Korean office, to set up a Guam corporation that would be able to take advantage of business opportunities not available to ADM. Edwards incorporated Asia Management Systems, Inc., whose name was soon changed to ADM Asia. Ashton and Dale each owned 37.5% of that company, while Bowers owned 25%. Following instructions from petitioner, Bowers also arranged for Edwards to purchase four Hong Kong corporations: Capulus, Fossano, Swaffham, and Gemona. Ownership of Swaffham and Gemona subsequently was transferred to petitioner, Ashton, and Bowers in the same percentages as ADM Asia. Pet. App. a5.

In February, May, and September 1986, petitioner and Ashton received payments totaling $50,000 from ADM funds channeled through ADM's Korean office. They did not report those payments as income on their 1986 federal income tax returns. Pet. App. a5-a6.

In addition, ADM made several payments to related companies during 1986 and 1987, and falsely treated some of those payments as business deductions. First, in August 1986, ADM paid $200,000 to Arlington Associates, a firm that was owned in equal shares by petitioner and Ashton. Arlington Associates initially reported the payment as a loan from Guam National Bank. Petitioner later instructed Bowers to draft documents reflecting

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[1] ADM, Ashton, Sweeney, and Segal were tried with petitioner, and were found guilty of all charges against them. Pet. App. a14-a15. Their appeals from the judgments of conviction were consolidated with petitioner's appeal (*id.* at a1-a2, a14-a16), but they do not join in this petition. Ashton filed a separate petition for a writ of certiorari (No. 93-131), which was denied on October 4, 1993.

that the payment was a loan to Arlington from Asia Management Systems (*i.e.*, ADM Asia). Pet. App. a6.

Second, in late 1986, ADM paid $417,532 to Swaffham and Gemona for marketing and product studies and other consulting work that was never actually performed. ADM recorded those payments as deductible business expenses. Third, in March 1987, petitioner and Bowers created a phony debt of $500,000 to Swaffham. The $500,000 "debt" was for software development purportedly performed by Swaffham but actually performed by ADM's Korean office at a cost of only $30,000. The "debt" was deducted as a business expense on ADM's 1986 tax return. Pet. App. a6-a7.

Meanwhile, Terence Sweeney, the Vice-President in charge of ADM's European operations, hired Larry Knight as a consultant. Sweeney and Knight subsequently formed a German corporation, ADM Hard- und Software Handelgesellschaft GmbH in Deutschland (ADM H&S) to take advantage of non-Army business opportunities in Germany. Petitioner and Ashton each owned 37.5% of ADM H&S, Sweeney owned 25%, and Knight was appointed general manager. Pet. App. a7-a8.

In December 1986, ADM wire-transferred $316,000 to Bourbonia Invest AG (Bourbonia), a Swiss investment firm operated by a friend of Knight's. In January 1988, ADM made a second payment to Bourbonia, in the amount of $102,655. Those payments were purportedly for consulting work performed by Bourbonia for ADM, but they in fact accrued to the benefit of petitioner, Ashton, ADM, and ADM H&S. The payments were treated by ADM as business deductions. Pet. App. a8-a9.

In early 1987, petitioner filed three forms with the Department of Defense in order to obtain a security clearance for ADM. Petitioner first completed a "Personnel Security Questionnaire," which asked him to disclose all

of his overseas business connections. In responding to that question, petitioner made no mention of the Hong Kong corporations, Swaffham and Gemona, although he had acquired a 37.5% interest in each of those two companies by November 1986. Petitioner also signed a "Statement of Full Disclosure of All Foreign Connections" in which he purported to "explain and fully disclose [his] foreign connections"; on that form, he disclosed only his 37.5% interest in ADM H&S. Pet. App. a9-a10. In addition, petitioner signed a form entitled "Certificate Pertaining to Foreign Interests," which indicated that ADM did not have interlocking directors with any foreign interests. *Ibid.*

In March 1987, after becoming concerned about his future with ADM and about potential criminal liability, Bowers began to tape record conversations with petitioner and Ashton. He also withdrew funds from Gemona's and Swaffham's bank accounts that he claimed represented his interest in the two corporations. Bowers testified that those actions represented his efforts to protect himself. Pet. App. a10-a11 & n.13.

On August 14, 1987, Bowers transmitted a resignation letter by facsimile to Ashton. In response, Ashton and Segal flew to Korea in an attempt to persuade Bowers to turn over all business records, including all tape recordings of telephone conversations, and to surrender his interests in ADM Asia, Gemona, and Swaffham. When Bowers refused, ADM and its principals took steps to alter the tax treatment of many of the transactions outlined above. Pet. App. a11.

First, in late August or early September 1987, Segal notified ADM's outside accountants that ADM's records had to be changed because the $417,532 paid to Gemona and Swaffham in December 1986 was not deductible. Segal also told the accountants that there was additional

revenue that had not been recorded. ADM's 1986 corporate tax return reflecting that information was timely filed on September 15, 1987. Pet. App. a11-a12.

Second, on November 30, 1987, petitioner and Ashton met with their personal accountant and told him that they had received taxable income that had not been included on their 1986 individual tax returns. Ashton subsequently filed an amended 1986 return adding taxable income of $40,000, which she characterized as previously unreported travel advances. Petitioner later added $10,000 to the taxable income reported on his 1987 return. Pet. App. a12.

Third, apparently in late August 1987, petitioner and Ashton signed a promissory note promising to repay ADM the $200,000 that ADM had paid to Arlington Associates in August 1986. That payment to Arlington Associates had initially been recorded as a loan from Guam National Bank and was later characterized by petitioner as a loan from Asia Management Systems. Pet. App. a12.

Fourth, during the summer of 1988, after federal agents searched ADM's headquarters, Segal informed one of ADM's accountants that ADM had mistakenly paid $316,000 in consulting fees on behalf of ADM H&S. Accordingly, the accountant prepared an amended return eliminating the deduction that ADM had previously taken for the December 1986 payment to Bourbonia. Segal drafted a memorandum to the accountant explaining that both the $316,000 payment and the subsequent $102,655 payment to Bourbonia were made in error. He also said that petitioner and Aston would repay ADM for the amounts paid to Bourbonia. Shortly thereafter, four promissory notes were prepared to divide the indebtedness between petitioner and Ashton according to their respective ownership interests in ADM. Pet. App. a13.

Finally, Segal told one of ADM's accountants in March 1989 that he had discovered that a $500,000 item formerly treated as a business deduction for software development had never been paid and should have been reversed. The accountant subsequently prepared an amended return deleting the $500,000 deduction. Pet. App. a13.

2. Prior to trial, petitioner filed a motion to suppress evidence seized during a search of ADM's offices in Washington, D.C., arguing that the warrant authorizing the search was unduly general. The warrant was based on an extensive affidavit of Heide K. Shintani, a special agent of the Defense Criminal Investigative Services, setting out alleged criminal violations of a variety of federal fraud statutes arising out of ADM's alleged substitution of less costly disk drives in lieu of the disk drives called for by the terms of ADM's contract with the Army. Pet. App. a83-a84.

The warrant sought "records and documents as further described in Attachment B." Pet. App. a44. Attachment B set forth numerous categories of business records believed to contain "specific information regarding the false statements and claims made by ADM." *Ibid.*[2] Each category of records set forth in the

[2] Those records included: claims for payment from the government; Department of Defense Forms 250; Army purchase orders and ADM shipping documents; invoices showing deliveries from several named suppliers; records of payments to the same named suppliers; receipts of payments from the Army; receipts of rebates from vendors; records reflecting installation of specified hard disks; production of assembly records; overseas bank account records; correspondence and memoranda between ADM and the same named suppliers; internal documents pertaining to the substitution of the hard disks; directions prepared for assembly technicians; and financial documents submitted to the Army or the Small Business Administration. Pet. App. a85 n.3.

Attachment was separated by a semi-colon; at the end of the list, following a comma, was the phrase "and other records which relate to the criminal scheme outlined in the above affidavit" of Agent Shintani. *Id.* at a44, a85 n.3. The time period of the records to be seized was limited to "June 1, 1984 through the present." *Id.* at a44. The warrant was executed on June 16, 1988, by Special Agent Shintani and approximately 14 other law enforcement officers. *Id.* at a84-a85.

The district court denied the motion to suppress. The court found that the warrant was not overly broad for two reasons: first, the warrant identified specific and limited categories of records to be seized; and second, the warrant limited the search to documents related to the criminal scheme outlined in the underlying affidavit. Pet. App. a44, a99-a101.

3. The court of appeals affirmed petitioner's convictions. Pet. App. a1-a70. The court rejected petitioner's claim that the tape recordings made by Bowers should not have been admitted because the district court failed to make an explicit threshold determination that they were trustworthy. *Id.* at a36-a38. Noting that admission of tape recordings is within the discretion of the district court "so long as the tapes are authentic, accurate and trustworthy," the court of appeals held that an express statement by the lower court that the tapes were reliable was not essential in this case "because the record indicates that the court accepted the government's proffer of trustworthiness and rejected [petitioner's] concerns." *Id.* at a36. In reaching that conclusion, the court of appeals relied on the fact that the tapes were admitted only after the government had presented extensive testimony concerning the creation and handling of the tapes. *Id.* at a37.

The court also rejected petitioner's argument that the trial court erred in refusing to hold an evidentiary hearing under *Franks* v. *Delaware*, 438 U.S. 154 (1978), to investigate whether Agent Shintani had intentionally or recklessly made false statements in her affidavit supporting the warrant to search ADM's offices and warehouse. Pet. App. a38-a43. The court held that Agent Shintani's failure to contact any Army officials in order to verify the allegations made by former ADM employees did not evidence reckless disregard for the truth, because an investigating officer need not "exhaust every possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence" in order to demonstrate probable cause. *Id.* at a40. Moreover, the court noted that the agent's "failure to contact Army officials may have been entirely prudent given the possibility of a leak back to ADM." *Ibid.* Accordingly, the court concluded that "the district court correctly refused to hold a *Franks* hearing because [petitioner] failed to make a substantial preliminary showing that the government had knowingly, intentionally or recklessly disregarded the truth." *Id.* at a43.

The court next addressed petitioner's contentions that the warrant was overly broad and that the warrant's incorporation of Agent Shintani's affidavit was not a sufficient limitation on the government's search. Pet. App. a43-a49. The court rejected the district court's finding that the warrant was sufficiently particular on its face to satisfy the Fourth Amendment. In the court of appeals' view, "[t]he warrant's explicit authorization to the agents to seize 'business records including, but not limited to' those specifically identified subjected essentially all of ADM's records dated after June 1, 1984 to seizure" and rendered the warrant unduly general on its face. *Id.* at a44.

The court held, however, that Agent Shintani's affidavit sufficiently narrowed the scope of the warrant so as to satisfy the particularity requirement. Pet. App. a45-a48. The court explained that a search warrant may be construed with reference to a supporting affidavit if the affidavit is incorporated in, and accompanies, the warrant. *Id.* at a45. The court then upheld the district court's finding that the warrant incorporated the Shintani affidavit. *Id.* at a45-a47 & n.49.

In addition, although noting that the record was not clear as to whether the affidavit had actually accompanied the warrant, the court of appeals found that the allegations in the affidavit were in fact used to limit the scope of the warrant. Pet. App. a47-a48. The court explained that "Agent Shintani, who prepared the affidavit and obtained the warrant, was present at the search, oversaw the warrant's execution and guided the participating agents in seizing documents to conform the search to her understanding of the warrant's requirements." *Id.* at a48. Those precautions, the court held, "sufficiently limited the discretion of the executing agents." *Ibid.* Accordingly, the court concluded that the warrant in this case was sufficiently particular "because it identified several specific categories of documents to be seized, incorporated an affidavit to limit the search and was executed by the affiant pursuant to a specific plan." *Ibid.*

The court of appeals also found unpersuasive petitioner's argument that the district court's definition of reasonable doubt impermissibly lowered the government's burden of proof. Pet. App. a57-a58. Petitioner contended that the court's instructions improperly implied that a juror must be able to articulate a reason for his or her decision to find a defendant not guilty and impermissibly conveyed the impression that a high degree

of indecision is needed in order to justify a verdict of not guilty. After examining the challenged instruction, the court of appeals concluded that "[t]he instruction in its entirety fairly conveyed that the requisite doubt must be 'based on reason' as distinguished from fancy, whim or conjecture," and that "'in the context of the instructions as a whole and the trial record,' there is no 'reasonable likelihood that the jury . . . applied the challenged instruction in a way that violates the Constitution.'" *Id.* at a58, quoting *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 (1991).

ARGUMENT

1. a. Petitioner contends (Pet. 11-14) that the court of appeals erred in holding that the search warrant at issue in this case satisfied the Fourth Amendment's particularity requirement. According to petitioner, an otherwise overbroad warrant cannot be cured by incorporation of a supporting affidavit where the record does not conclusively establish that the affidavit was present at the search. That claim does not warrant further review.

In order to prevent government officials from engaging in "a general, exploratory rummaging in a person's belongings," the Fourth Amendment requires that search warrants contain "a 'particular description' of the things to be seized." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). That particularity requirement "makes general searches * * * impossible and prevents the seizure of one thing under a warrant describing another." *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965). The court of appeals correctly sustained the district court's finding that the warrant in this case was sufficiently particular.

Assuming *arguendo* that the warrant was overbroad without reference to Agent Shintani's affidavit, the war-

rant's incorporation of that affidavit clearly sufficed to limit and refine the scope of the warrant. There was no need for the affidavit physically to accompany the warrant because Agent Shintani, who prepared the affidavit and obtained the warrant, was present at the search and directed the executing agents. Pet. App. a48. There is no contention in this case that the agents ignored the limitations in the warrant and the accompanying affidavit in conducting the search (*id.* at a49), so there can be no doubt that the government confined the scope of its search within the proper parameters. Under those facts, the warrant must be deemed sufficiently particular to satisfy the requirements of the Fourth Amendment.

Petitioner asserts that the decision below conflicts with decisions of numerous courts of appeals holding that a supporting affidavit must actually "accompany" a warrant in order to cure any facial overbreadth in the warrant. Pet. 12-13 & nn.8-12.[3] In none of the cases cited by petitioner, however, did the court hold that a warrant that expressly incorporated the supporting affidavit nonetheless violated the particularity requirement. Thus, none of those cases addresses the question at issue in this case, namely, whether the facial overbreadth of a warrant that expressly incorporates its supporting affidavit may be cured by the affiant's presence at, and direction of, the search conducted pursuant to the warrant. Accordingly, this case does not implicate a square conflict among the circuits.

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[3] See *United States* v. *Falon*, 959 F.2d 1143 (1st Cir. 1992); *Application of Lafayette Academy, Inc.*, 610 F.2d 1 (1st Cir. 1979); *United States* v. *George*, 975 F.2d 72 (2d Cir. 1992); *United States* v. *Johnson*, 690 F.2d 60 (3d Cir. 1982), cert. denied, 459 U.S. 1214 (1983); *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F.2d 747 (9th Cir. 1989); *United States* v. *Leary*, 846 F.2d 592 (10th Cir. 1988).

b. In any event, the issue raised by petitioner does not warrant this Court's attention under the circumstances of this case. Even if the court of appeals erred in upholding the validity of the warrant, Agent Shintani plainly acted in good faith in obtaining and executing that warrant, and the evidence at issue was therefore admissible by virtue of the good-faith exception to the exclusionary rule identified in *United States* v. *Leon*, 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984).

In *Leon*, this Court held that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." 468 U.S. at 919. That is particularly true, the Court noted, "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id.* at 920. The Court reasoned that, in such circumstances, the deterrent value of the exclusionary rule is vitiated by the fact that an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the search warrant is technically sufficient. *Id.* at 921.

In *Sheppard*, the Court applied the good faith exception to a search warrant that insufficiently described the items to be seized. There, the trial judge had suppressed evidence seized during the execution of a search warrant that incorrectly identified the items to be seized as evidence of a narcotics transaction, rather than a murder. Relying on *Leon*, this Court reversed, emphasizing that the officers had demonstrated their good faith by submitting an affidavit to a judge and thereafter relying on the judge's determination that the warrant he issued was sufficiently particularized. 468 U.S. at 989-991.

The same considerations that prompted this Court to apply the good-faith exception in *Leon* and *Sheppard* are

also present here. Agent Shintani "took every step that could reasonably be expected of [her]." *Sheppard*, 468 U.S. at 989. She prepared an extensive affidavit that detailed a pervasive fraudulent scheme. She presented that affidavit to a magistrate, who found probable cause to justify the searches and approved the description of the property to be seized. Moreover, as the court of appeals noted, this case involved a complex scheme to defraud, making it difficult to list with any greater particularity the books and records to be seized. Pet. App. a48; see *Andresen* v. *Maryland*, 427 U.S. 463, 480 n.10 (1976).

In addition, the fact that the affiant "was present at the search, oversaw the warrant's execution and guided the participating agents in seizing documents to conform the search to her understanding of the warrant's requirements" (Pet. App. a48) provided additional evidence of good faith. See *United States* v. *Luk*, 859 F.2d 667, 677 (9th Cir. 1988); *United States* v. *Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983). Finally, Agent Shintani and the other executing agents demonstrated their good faith by confining the scope of their search to the parameters of the warrant. See *United States* v. *Luk*, 859 F.2d at 677-678.

Petitioner contends (Pet. 13-14) that the courts of appeals are divided over the question whether the good-faith exception adopted in *Leon* is applicable "where the description of things to be seized is not sufficiently particular on the face of the warrant." It is clear from *Leon* itself, however, that insufficient particularity does not automatically preclude application of the good-faith exception. *Leon* held that suppression is appropriate when a search warrant is so facially deficient in failing to particularize the things to be seized that the executing officer could not reasonably presume that the warrant is valid. 468 U.S. at 923. But *Leon* did not hold that the

good-faith exception is inapplicable whenever a warrant is later found to be overbroad. Instead, whether the exception will apply "depend[s] on the circumstances of the particular case." *Ibid.*

In this case, the express incorporation by reference of the supporting affidavit into the warrant was alone sufficient to justify a belief on the part of the agents that the warrant gave them sufficient guidance as to what was to be seized. Thus, the good-faith exception would be applicable here even if the warrant were found to be unduly general.[4]

None of the cases on which petitioner relies (Pet. 14 n.18) holds that the good-faith exception is automatically inapplicable in all cases involving insufficiently particular warrants. To the contrary, in *United States* v. *Leary*, 846 F. 2d 592 (10th Cir. 1988), the court recognized that *Sheppard* "held that the [good-faith] exception could also be applied to warrants that violate the fourth amendment's particularity requirement." 846 F.2d at 607. The *Leary* court further indicated that even though it had declared the warrant at issue to be facially invalid, it still had to review the text of the warrant and the circumstances of the search to ascertain whether the agents in the case might have reasonably presumed the warrant to be valid. *Id.* at 607-609.

In *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F.2d 747 (9th Cir. 1989), the court found that the affidavit was not expressly incorporated into the warrant and that the warrant therefore provided "for the almost unrestricted seizure of items which are 'evidence of vio-

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[4] Indeed, it would be curious to characterize the conduct of Agent Shintani and the other agents as reflecting bad faith where both lower courts found that the warrant was sufficiently particular.

lations of federal criminal law' without describing the specific crimes suspected." *Id.* at 750. In addition, the officer seeking the warrant was "aware of [the] overbreadth problem" but failed to bring that problem to the magistrate's attention or seek specific assurances that any possible defects would not invalidate the warrant. *Id.* at 753. Under those circumstances, the court concluded, the officer did not do "all that reasonably could be expected of him," and thus the good-faith exception was inapplicable. *Ibid.* *Center Art* did not hold that the good-faith exception may never be invoked in cases involving insufficiently particular warrants. Compare *United States* v. *Michaelian*, 803 F.2d 1042 (9th Cir. 1986) (applying good-faith exception to reject claim that warrant violated particularity requirement).

Finally, in *United States* v. *Decker*, 956 F.2d 773 (8th Cir. 1992), the judge who issued the warrant "acted as a rubber stamp," and the warrant "did not list the property to be seized." *Id.* at 777.[5] Moreover, "the officers seized hundreds of items unrelated to the search warrants." *Ibid.* Under those circumstances, the court of appeals concluded that "we cannot rule that the officers behaved in an objectively reasonable fashion." *Ibid.* In addition, the court held that the issuing judge's conduct in acting as a "rubber stamp" rendered the good-faith exception inapplicable, because "the *Leon* good faith exception does 'not apply in cases where the issuing magistrate wholly abandoned his judicial role.'" *Id.* at 778. The court did not purport to hold, however, that the good-faith

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[5] Unlike the warrant at issue in this case, the *Decker* warrant did not incorporate the supporting affidavit (956 F.2d at 776), and thus the warrant contained no meaningful limitation on the government's search.

exception is per se inapplicable in any case involving an insufficiently particular warrant.

2. Petitioner contends (Pet. 14-17) that the court of appeals erred in declining to order the district court to conduct a full evidentiary hearing under *Franks* v. *Delaware*, 438 U.S. 154 (1978). In *Franks*, the Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. at 155-156.

Petitioner asserts (Pet. 14-15) that a *Franks* hearing was required because Agent Shintani failed to investigate the allegations set forth in her affidavit that ADM had illegally substituted products in executing contracts with the Army. Both courts below found, however, that Agent Shintani's failure to conduct such an investigation did not constitute intentional falsehood or reckless disregard for the truth within the meaning of *Franks*. Pet. App. a40, a94-a96. Thus, the courts below properly applied the legal standard set forth in *Franks*; those courts' fact-bound determination that petitioner failed to satisfy the applicable legal standard is not worthy of review.

In any event, as the courts below properly held (Pet. App. a40, a96), an affiant's failure to conduct a complete investigation before preparing an affidavit for a search warrant does not demonstrate reckless disregard for the truth. See *United States* v. *Miller*, 753 F.2d 1475, 1478 (9th Cir. 1985); *United States* v. *Mastroianni*, 749 F.2d 900, 909-910 (1st Cir. 1984). Indeed, as the court of appeals noted, Agent Shintani's failure to investigate the

substitution allegations "may have been entirely prudent given the possibility of a leak back to ADM." Pet. App. a40. The lower courts therefore correctly found that a *Franks* hearing was not required.

3. Petitioner next contends (Pet. 20) that the district court erred by not making an express preliminary determination under Federal Rule of Evidence 104 that certain tape recorded evidence admitted at trial was reliable and authentic.[6] The court of appeals correctly rejected that claim (Pet. App. a36-a38), and its ruling does not conflict with any decision of this Court or any other court of appeals. Petitioner's claim therefore does not warrant review by this Court.

The language of Rule 104 does not require a district court to make explicit findings of fact or to explain its rationale in detail when ruling on preliminary questions of admissibility. Instead, Rule 104 requires only that the court decide such questions under the appropriate legal standard. That requirement was satisfied in this case.[7]

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[6] Under Rule 104(a), "[p]reliminary questions concerning * * * the admissibility of evidence shall be determined by the court."

[7] The proper test for determining the admissibility of tape-recorded evidence is the one indicated by Fed. R. Evid. 901(a)—whether the evidence was sufficient to support a finding by the jury that the tape recordings are authentic. The standard set forth in Rule 901(a) requires only that the court conclude that the jury could find that the evidence is authentic. See 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 901(a)(01), at 901-17 to 901-19 & n.8 (1993). Because authentication questions under Rule 901(a) present issues of conditional relevance, Rule 901(a) rulings are governed oy the standard set forth in Rule 104(b). See Rule 901 advisory committee notes. Rule 104(b) provides that a court must admit conditionally relevant evidence if the jury could find the condition satisfied by a preponderance of the evidence. See *Huddleston* v. *United States*, 485 U.S. 681, 689-690 (1988).

The district court heard testimony on the admissibility of the tape recordings at issue before deciding whether to admit them. Pet. App. a37. In particular, the district court heard testimony in which a government witness identified the tapes and discussed the chain of custody and the electronic enhancement of the tapes. Gov't C.A. Br. 82-83. In addition, Bowers testified about his taping of the conversations, his taping practices, and the timing and circumstances of his delivery of the tapes to government agents, and he testified that the tapes constituted fair and accurate recordings of conversations to which he was a party. *Id.* at 83-84. The court also engaged in a lengthy discussion with counsel about the accuracy and reliability of the tapes, and petitioner declined an offer for additional testimony concerning the reliability of the tapes. Thereafter, the district court admitted the tapes into evidence. Pet. App. a37.

The court of appeals found that "the record indicates that the [district] court accepted the government's proffer of trustworthiness and rejected [petitioner's] concerns." Pet. App. a36. Moreover, the court of appeals concluded that the district court "implicitly found that 'the possibilities of misidentification and adulteration [were] eliminated, not absolutely, but as a matter of reasonable probability.'" *Id.* at a36-a37. The record plainly supports the court of appeals' determinations in that regard, and petitioner's claim to the contrary does not warrant review.[8]

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[8] Petitioner also asserts (Pet. 17-20) that this Court should grant review in this case in order to determine the proper standard for admissibility of tape-recorded evidence under the Federal Rules of Evidence. There is no need, however, for the Court to announce any special rule to govern the admissibility of such evidence. Tape recordings do not present any unique problems with regard to assessment of their authenticity, accuracy, or reliability.

4. Petitioner claims (Pet. 20-24) that the government should not be permitted to charge a defendant under general conspiracy (18 U.S.C. 371) and wire fraud (18 U.S.C. 1343) statutes when the underlying criminal conduct also violates the criminal tax statutes. That claim does not warrant further review.[9]

It is settled law that a conspiracy to impede and impair the functions of the IRS is punishable as a conspiracy to defraud the United States under 18 U.S.C. 371. See, *e.g.*, *United States* v. *Sturman*, 951 F.2d 1466, 1472-1474 (6th Cir. 1991); *United States* v. *Notch*, 939 F.2d 895, 901 (10th Cir. 1991); *United States* v. *Chesson*, 933 F.2d 298, 306-307 (5th Cir.), cert. denied, 112 S. Ct. 583 (1991); *United States* v. *Shermetaro*, 625 F.2d 104, 109-111 (6th Cir. 1980); *United States* v. *Turkish*, 623 F.2d 769, 771 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). Similarly, the use of the mails or wires in furtherance of tax fraud constitutes mail or wire fraud under 18 U.S.C. 1341 or 1343. See, *e.g.*, Pet. App. a49-a50; *United States* v. *Condo*, 741

Moreover, petitioner fails to point to any conflict among the circuits regarding the proper standard for the admission of tape recordings, nor does he claim that the standard applied by the courts below is inconsistent with any decisions of this Court. Accordingly, there is no reason for the Court to consider the issue at this time.

[9] In the court of appeals, petitioner asserted only that his conviction for wire fraud in violation of 18 U.S.C. 1343 could not stand because "the criminal provisions of the Internal Revenue Code * * * are the exclusive means of prosecuting such alleged frauds." ADM C.A. Br. 25 (incorporated by reference, Pet. C.A. Br. 1). The court of appeals rejected that assertion. Pet. App. a49-a50. The broader arguments that petitioner seeks to raise in this Court were not pressed or passed upon below, and are therefore not properly presented for review by this Court. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

F.2d 238, 239 (9th Cir. 1984) (per curiam), cert. denied, 469 U.S. 1164 (1985); *United States* v. *Miller*, 545 F.2d 1204 (9th Cir. 1976), cert. denied, 430 U.S. 930 (1977).

United States v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989), is not to the contrary. In that case, the Sixth Circuit held that defendants who had conspired to commit only the specific statutory offense of concealing assets in order to avoid a levy for unpaid taxes, in violation of 26 U.S.C. 7206(4), could not be convicted of conspiracy to defraud the United States under 18 U.S.C. 371, but should instead have been charged with conspiracy to violate Section 7206(4). 875 F.2d at 1190-1196. The court explained that its interpretation of the conspiracy statute was "the only way we can give full effect to the intention of Congress as expressed in § 7206(4)," *id.* at 1194, and that "where the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, * * * a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause" of 18 U.S.C. 371. 875 F.2d at 1196.

The Sixth Circuit's rationale in *Minarik* is inapplicable in this case. Petitioners were not charged with a violation of 26 U.S.C. 7206(4), and the conspiracy alleged in the indictment was considerably broader than an agreement to violate one particular provision of the Internal Revenue Code. Petitioners used a variety of different methods to defraud the IRS, including the filing of false tax returns and the creation of shell corporations and false accounting records. As the Sixth Circuit itself has made clear, *Minarik* announced only "a limited rule to remedy the particular concerns raised by the facts of that case" and does not apply in cases where "the con-

spiracy implicated a variety of statutes." *United States* v. *Mohney*, 949 F.2d 899, 903, 905 (6th Cir. 1991); see *United States* v. *Sturman*, 951 F.2d 1466, 1473 & n.1 (6th Cir. 1991) (distinguishing *Minarik* because "[t]he conspiracy alleged and proven here was broader than a violation of a specific statute," and noting that other Sixth Circuit decisions "lend support to limiting *Minarik* to its facts"). Thus, whatever the validity of *Minarik* in the unique circumstances of that case, it has no application here. Cf. *United States* v. *Notch*, 939 F.2d at 901.[10]

5. Relying on *Cage* v. *Louisiana*, 498 U.S. 39 (1990), petitioner contends (Pet. 24-25) that the district court's instruction defining "reasonable doubt" was unconstitutional. As the court of appeals found (Pet. App. a57-a58), however, the instruction at issue in this case did not include the elements found impermissible in *Cage*. The *Cage* instruction "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt,' and stated that what was required [for conviction] was a 'moral certainty' that the defendant was guilty." 498 U.S. at 41. There was no similar language in the instruction at issue here, which provided:

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[10] Petitioner identifies as the seventh question presented (Pet. ii) whether the district court properly instructed the jury on conspiracy to defraud the United States and whether the court erred in refusing to define "deductible expense[s]" or instruct the jury that truth is a defense under 18 U.S.C. 1001. The petition contains no argument addressed to those contentions, however, which were considered and rejected by the court of appeals. Pet. App. a53-a57. Petitioner does not argue that the court of appeals' resolution of those issues was incorrect or that its decision conflicts with any decision of this Court or of any other court of appeals. Accordingly, there is no reason for this Court to review those questions.

> Reasonable doubt, as that name implies, is a doubt based on reason, it is a doubt for which you can give a reason. It is such a doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or to pause in the graver or more important transactions of life. However, it is not a fanciful doubt, nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt that is based on reason. The government is not required to establish guilt beyond all doubt or to a mathematical certainty or to a scientific certainty. The government's burden is to establish guilt beyond a reasonable doubt.[11]

Pet. App. a57 (emphasis omitted).

That instruction did not in any way "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U.S. at 41. As the court of appeals noted, the instruction properly "conveyed that the requisite doubt must be 'based on reason' as distinguished from fancy, whim or conjecture." Pet. App. a58. Thus, the court of appeals correctly rejected petitioner's argument that the instruction was unconstitutional, and in any event the court's application of the principles set forth in *Cage* to the particular instruction at issue in this case is not worthy of review.[12]

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[11] That instruction is substantially the same as standard jury instruction 2.09 of the Criminal Jury Instructions for the District of Columbia (3d ed. 1978). Pet. App. a57 n.53.

[12] There is no need to hold the petition in this case pending the Court's resolution of *Victor* v. *Nebraska*, No. 92-8894, and *Sandoval* v. *California*, No. 92-9049. In *Victor*, the petitioner challenges (92-8894 Pet. 33-39) an instruction that equated reasonable

6. Petitioner asserts (Pet. 25) that the district court failed to comply with Application Note 5 to Sentencing Guidelines § 1B1.2 in sentencing petitioner on the conspiracy count. According to petitioner, the district court failed to make the requisite finding beyond a reasonable doubt that petitioner was responsible for each object of the conspiracy. That contention does not merit further review.

Under Guidelines § 1B1.2(d), when a defendant is convicted "on a count charging a conspiracy to commit more than one offense," the sentencing range applicable to the conspiracy conviction is computed "as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Application Note 5 to that provision states in part:

> Particular care must be taken in applying subsection (d) because there are cases in which the jury's verdict does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

The court of appeals concluded that "[t]he record * * * indicates that the district court did make the required determination of the object of the conspiracy." Pet. App. a61. The court observed that the district court expressly

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doubt with "substantial doubt." In *Sandoval*, the petitioner claims (92-9049 Pet. 8-11) that the inclusion of the phrases "moral certainty" and "moral evidence" rendered the reasonable doubt instruction constitutionally deficient. The instruction in this case contained none of the phrases at issue in *Sandoval* and *Victor*, and thus the disposition of those cases will not undermine the correctness of the court of appeals' decision here.

found that the relevant base offense level for petitioner's conspiracy conviction was that applicable to "conspiracy with an attempt to avoid taxes or tax evasion, rather than one based on false statements." *Ibid.* Moreover, the district court expressly adopted the findings of the presentence report that "[i]n this conspiracy, [petitioner] attempted to evade both personal and corporate taxes." *Ibid.* Finally, the court of appeals relied on the fact that the jury also convicted petitioner and his co-conspirator of attempting to evade taxes, thus demonstrating beyond a reasonable doubt that petitioner and his co-conspirator committed the underlying substantive offense. *Id.* at a61-a62. Under these circumstances, the court of appeals was correct in concluding that the district court made the requisite finding.

7. Finally, petitioner contends (Pet. 25-26) that the district court's application of the Guidelines to the conspiracy count of the indictment violated the Double Jeopardy Clause. Petitioner failed to raise that contention in the court of appeals, however, and that court did not address it. Accordingly, this Court should not consider the claim in the first instance. *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. at 2466; *United States* v. *Lovasco*, 431 U.S. at 788 n.7.

In any event, petitioner's contention is without merit. The Double Jeopardy Clause does not forbid imposition of one sentence for conspiracy and a different sentence for the underlying substantive offense, because conspiracy and substantive crimes are separate and distinct offenses for double jeopardy purposes. See, *e.g.*, *United States* v. *Felix*, 112 S. Ct. 1377, 1384 (1992). Thus, there is no possible basis for challenging as violative of the Double Jeopardy Clause the district court's decision to sentence petitioner under pre-Guidelines law with respect to his pre-Guidelines conduct while at the same time sentenc-

ing petitioner under the Guidelines for his conspiracy conviction, which was based in part on post-Guidelines conduct.[13] Petitioner's claim to the contrary does not merit review.

Petitioner also appears to assert (Pet. 26) that application of the Guidelines to the conspiracy conviction violated the Ex Post Facto Clause because some of the conduct supporting the conspiracy conviction took place prior to the November 1, 1987, effective date of the Guidelines. Petitioner did not raise that claim in the court of appeals. In any event, it is well settled that the Ex Post Facto Clause is not implicated where an offense, though

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[13] *United States* v. *Niven*, 952 F.2d 289 (9th Cir. 1991), is not to the contrary. In that case, the defendant was convicted on multiple counts of mail and wire fraud, only some of which involved conduct occurring after the effective date of the Sentencing Guidelines. In determining the applicable Guidelines sentencing range, the district court took into account the entire loss suffered by the defendant's victims as a result of all of the defendant's substantive offenses, including those committed prior to the effective date of the Guidelines. *Id.* at 293. In order to avoid what it viewed as a potential violation of the Double Jeopardy Clause, the court of appeals construed the Guidelines to require the district court either to determine the Guidelines sentence based solely on post-Guidelines conduct or to impose concurrent sentences for the pre-Guidelines and post-Guidelines offenses. *Id.* at 293-294.

In this case, petitioner received concurrent sentences for the post-Guidelines conspiracy conviction and the pre-Guidelines substantive offenses. Thus, the sentence imposed is entirely consistent with *Niven*. In any event, *Niven* has no application in this case, because here, unlike in *Niven*, the district court did not base petitioner's Guidelines sentence on pre-Guidelines conduct that was not itself a part of the post-Guidelines crime. Petitioner's conspiracy conviction was based on both pre-Guidelines and post-Guidelines conduct, and petitioner cites no authority for the proposition that the Double Jeopardy Clause precludes imposition of a sentence for conspiracy based on the conduct giving rise to the conviction.

begun before the effective date of the challenged criminal statute, continues thereafter. See, *e.g.*, *United States* v. *Torres*, 901 F.2d 205, 226-227 (2d Cir.), cert. denied, 498 U.S. 906 (1990); *United States* v. *Kramer*, 955 F.2d 479, 485 (7th Cir.), cert. denied, 113 S. Ct. 595 (1992); *United States* v. *Giry*, 818 F.2d 120, 135 (1st Cir.), cert. denied, 484 U.S. 855 (1987); *United States* v. *Campanale*, 518 F.2d 352, 365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). Petitioner does not dispute that the conspiracy in this case continued after the effective date of the Guidelines.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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